



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

David C. Thompson, Esquire
David C. Thompson, P.C.
321 Kittson Avenue
P.O. Box 5235
Grand Forks, North Dakota 58201

JUN 19 2013

Re: MUR 6663

Dear Mr. Thompson:

On October 12, 2012, the Federal Election Commission notified your clients, Brad Crabtree, Crabtree for PSC, and Perry Miller in his official capacity as treasurer, of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act"). On June 11, 2013, the Commission found, on the basis of the information in the complaint, and information provided by your clients, that there is no reason to believe Brad Crabtree, Crabtree for PSC, and Perry Miller in his official capacity as treasurer violated 2 U.S.C. § 434(f). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Kamau Philbert, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Blumberg".

Peter Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Crabtree for PSC MUR: 6663
 and Perry Miller in his official
 capacity as treasurer
 Brad Crabtree.

I. INTRODUCTION

Complainant alleges that a candidate for the North Dakota Public Service Commission, his committee for that election, and the committee's treasurer, failed to disclose an electioneering communication that allegedly attacked a sitting member of the Public Service Commission, who was also a candidate for Congress. Respondents assert that the communication, a radio advertisement, was exempt from regulation because the communication was entirely focused on a state election, a non-federal committee paid for it, and the communication did not promote, support, attack or oppose ("PASO") a federal candidate. The Commission finds no reason to believe that the Respondents violated the Federal Election Campaign Act, as amended, ("FECA" or the "Act") or Commission regulations and closed the file.

II. FACTS

Brad Crabtree was a candidate in the November 6, 2012 election for a vacant seat on North Dakota's three-member Public Service Commission ("PSC"), the agency that regulates North Dakota's public utilities. Crabtree for PSC was his state campaign committee for that election, and Perry Miller was the treasurer of Crabtree for PSC. Kevin Cramer, one of the two incumbent commissioners on the PSC, was also a candidate for North Dakota's sole congressional district in the general election. Cramer filed his Statement of Candidacy with the Commission on October 27, 2011.

Crabtree for PSC produced a 30-second radio advertisement that was broadcast on various North Dakota radio stations during the period between August 6 and September 30, 2012. The advertisement featured Crabtree stating:

I'm Brad Crabtree, candidate for Public Service Commissioner. I believe you deserve more from your public officials. It's wrong for regulators to take political money from interests they regulate. But Public Service Commissioners Kevin Cramer and Brian Kalk have taken thousands of dollars from the very companies and executives whose projects they approve. Our PSC Commissioners are supposed to watch out for folks like you, not just the people who sign the checks.

That's why I've pledged not to accept any contributions from companies or executives with interests before the PSC. It's not what candidates say, but what they do that matters. See for yourself at crabtreeforpsc.com where I post the contributions my campaign receives.

I'm Brad Crabtree, candidate for Public Service Commissioner. I'd appreciate your vote to help me put you – the public – back into the Public Service Commission.

Get the rest of the story at crabtreeforpsc.com. Paid for by Crabtree for PSC, Perry Miller, Treasurer.

Compl., Attach 1.

The Complaint alleges that the advertisement was an undisclosed electioneering communication because the advertisement expressly attacks Cramer, a candidate for federal office, was publicly distributed within 60 days of the November 6 general election, and was targeted to the relevant electorate. It further states that Crabtree is not eligible for the "exemption available to state and local candidates" because the advertisement attacked or opposed Cramer.

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1 In support of its allegation, the Complaint provided a list of disbursements to radio
2 stations showing that Crabtree for PSC paid a total of \$28,304.40 to air the advertisement.¹
3 Compl., Attach 2. The disbursements are each broken down by date ranges of ten to 15 days.
4 As shown in the tables below, \$5,913.10 of the disbursements made for the advertisement aired
5 during periods of time that are entirely within the 60-day electioneering communication window
6 of September 7 through November 5. See Table 1, *infra*. An additional \$6,163.20 in
7 disbursements for the advertisement aired during a 12-day period, of which only one day
8 (September 7) is inside the electioneering communication window. See Table 2, *infra*.² Finally,
9 \$15,728.10 in disbursements were for the advertisement that aired completely outside the
10 electioneering communication window. See Table 3, *infra*.

Table 1: Ads Broadcast Within Electioneering Communication Window		
Radio Stations	Broadcast Dates	Broadcast Costs
KMJO FM	9/18-9/28	\$617.10
KFGO AM	9/18-9/28	\$1,224.00
KBVB FM	9/18-9/28	\$1,428.00
KFYR & KBSS & KQDY	9/17-9/30	\$1,589.00
KCJB	9/18-9/28	\$476.00
K1ZZ	9/18-9/28	\$579.00
	TOTAL	\$5,913.10

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¹ In an effort to verify the reliability of the list, the Office of Complaints Examination and Legal Administration ("CELA") contacted the Complainant by telephone to inquire about the source of the disbursement information. Complainant informed CELA that the North Dakota Republican Party's media vendor obtained the information directly from the radio stations, but he offered no other details or documents, and instead asked that we "exercise[] some discretion" and "refrain [] from further prosecution of the complaint" because complainant now believes that the violations were "inadvertent." E-mail from Robert Harris, Treasurer, N.D. Repub. Party, to Jeffrey S. Jordan, Supervisory Att'y, FEC (Jan. 14, 2013).

² An expense identified by Complainant to KOVC AM, for \$500, for an invoice covering August 30-September 7 was excluded from the calculations because this radio station does not reach 50,000 or more listeners. See 11 C.F.R. § 100.29(e)(6)(i). The Commission confirmed that each of the other radio stations that broadcast the advertisement is capable of reaching 50,000 or more persons in North Dakota, the relevant electorate. *Id.*

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Table 2: Ads Broadcast Partially Within Electioneering Communication Window

Radio Stations	Broadcast Dates	Broadcast Costs
KCJB	8/28-9/7	\$499.00
K1ZZ	8/28-9/7	\$226.00
KMJO FM	8/27-9/7	\$504.00
KFGO AM	8/27-9/7	\$1,652.40
KBVB FM	8/27-9/7	\$1,332.80
FBVR AM	8/27-9/7	\$960.00
KSSS	8/27-9/7	\$494.00
KQDY	8/27-9/7	\$495.00
	TOTAL	\$6,163.20

Table 3: Ads Broadcast Outside Electioneering Communication Window

Radio Stations	Broadcast Dates	Broadcast Costs
KQDY	8/8-8/21	\$1,092.00
KFYR	8/8-8-21	\$1,380.00
KNOX	8/6-8/19	\$2,500.00
KMJO	8/7-8/17	\$1,239.30
KFGO AM	8/7-8/19	\$5,530.10
KCJB	8/8-8/17	\$662.00
K1ZZ	8/8-8/17	\$361.00
KSIB & KSIZ	8/9-8/22	\$1,001.30
KOVC & KQDJ	8/15-8/29	\$1,000.00
KQDJ	8/30-9/6	\$200.00
KLTC & KCAD	w/o 9/5	\$762.40
	TOTAL	\$15,728.10

Respondents seek dismissal of the Complaint on the grounds that the advertisement related to a state election over which North Dakota law has exclusive jurisdiction.³ Resp. at 3. The Response further claims that the communication is exempt from Commission regulation

³ Respondents' claim that this advertisement is exclusively governed by North Dakota law is addressed by the plain language of the "state and local candidate" exemption, under 11 C.F.R. § 100.29(c)(5), which indicates that generally only ads that PASO a federal candidate are reportable under FECA.

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1 because it does not constitute "federal election activity" as defined by FECA, and because the
2 communication qualifies for the "state or local candidate" exemption to the electioneering
3 communications rules under 11 C.F.R. § 100.29(c)(5) – because it was paid for by a state
4 candidate in connection with a state election and does not PASO a federal candidate. *Id.* at 2-4.
5 The Response charges that the Complaint omits "material facts" concerning the circumstances of
6 the election and the related advertisement, including that Cramer, along with Brian Kalk, were
7 sitting members of the PSC who had a practice of accepting contributions from the regulated
8 community and that a criticism of Cramer's and Kalk's practice was a "signature issue" in
9 Crabtree's campaign.⁴ *Id.* at 2. Thus, Respondents argue, when viewed in this context, it is
10 apparent that the communication was focused exclusively on Crabtree's effort to be elected to
11 the PSC and did not attack Cramer as a federal candidate or oppose Cramer's congressional
12 candidacy. *See* Resp. at 2-3. In their view, the advertisement criticizes Cramer solely in his role
13 as an incumbent PSC commissioner and that "any unmentioned connotation or inference" to
14 Crabtree's federal candidacy was "merely incidental." *Id.* at 2-3 & 5.

15 III. LEGAL ANALYSIS

16 The Complaint alleges that Respondents violated the Act by airing an electioneering
17 communication that cost in excess of \$10,000 without filing a required 24 Hour Notice of
18 Disbursements for Electioneering Communications (FEC Form 9) ("24 Hour Notice"). An
19 electioneering communication is a broadcast, cable, or satellite communication that: (1) refers to
20 a clearly identified candidate for federal office; (2) is made within 60 days before a general,
21 special, or runoff election for the office sought by the candidate . . . ; and (3) is targeted to the

⁴ Respondents provided copies of several news reports and press releases from April to October 2012 concerning Crabtree's prior criticism of the two incumbent PSC commissioners. *See* Resp. at 2, Ex. 2.

1 relevant electorate. 2 U.S.C. § 434(f)(3)(A); 11 C.F.R. § 100.29(a). A "clearly identified
2 candidate" means that the candidate's name, nickname, photograph, or drawing appears, or the
3 identity of the candidate is otherwise apparent through an unambiguous reference. 11 C.F.R.
4 § 100.29(b)(2). A communication is "targeted to the relevant electorate" when it can be received
5 by 50,000 or more persons in the district the candidate seeks to represent. 11 C.F.R.
6 § 100.29(b)(5). A communication that is paid for by a candidate for state or local office in
7 connection with a state or local election and does not promote, support, attack or oppose a
8 federal candidate is exempt from the statutory definition of electioneering communication. See
9 11 C.F.R. § 100.29(c)(5).

10 Persons who make aggregate disbursements exceeding \$10,000 for the cost of producing
11 and airing electioneering communications during any calendar year must, within 24 hours of
12 each disclosure date, disclose information regarding the communication. 2 U.S.C. § 434(f)(1).
13 The disclosure must include the identity of the person making the disbursement; the identity of
14 any person sharing or exercising direction or control over the activities of such person; the
15 amount and recipient of each disbursement over \$200; the election to which the communication
16 pertains and the name of the identified candidate; and the names and addresses of contributors
17 who give \$1,000 or more in the calendar year to the person making the disbursement. 2 U.S.C.
18 § 434(f)(2); 11 C.F.R. §§ 104.5(j), 104.20.

19 Based on the information supplied by the Complaint, \$6,529 was spent to broadcast the
20 advertisement within the electioneering communication window.⁵ Additional amounts were

⁵ When electioneering communications are distributed both inside and outside of the electioneering communications window, only those costs to produce and broadcast the advertisement within the electioneering communications window are reportable. See 2 U.S.C. § 434(f)(2)(C). When necessary, these costs are promoted to exclude costs for distribution outside the window. *Id.*; Table 1, *supra*, shows that \$5,913 was spent for air time that

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1 necessarily spent to produce the advertisement, but it does not appear that the prorated share of
2 these production costs would have been sufficient to reach the \$10,000 threshold.

3 Thus, regardless of whether the advertisement was an electioneering communication, the
4 available information shows that the costs of Crabtree's radio advertisement did not surpass the
5 \$10,000 threshold requiring disclosure. 2 U.S.C. § 434(f)(1). Therefore, Respondents had no
6 obligation to file a 24 Hour Notice with the Commission.

7 Accordingly, the Commission finds that there is no reason to believe that the Committee
8 violated 2 U.S.C. § 434(f) by failing to file a 24 Hour Notice in connection with the radio
9 advertisement and closed the file.

clearly fall within the electioneering communications window. Further, one day (September 7) of the 10 days covered by the disbursements included in Table 2, *supra*, falls within the window. Allocating those costs, approximately \$616 in additional air time costs are added to the total (\$5,913 + \$616 = \$6,529).

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